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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1903.

No. ~~388~~ 41.

THE CITY OF SAN JUAN, PLAINTIFF IN ERROR,

vs.

ST. JOHN'S GAS COMPANY, LTD., DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR PLAINTIFF IN ERROR.

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THE CITY OF SAN JUAN, PLAINTIFF IN ERROR,

vs.

ST. JOHN'S GAS COMPANY, LTD., DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

STATEMENT OF FACTS.

On August 21, 1875, a written contract was entered into between the plaintiff in error and one Julio E. Steinacher, whereby the city sold to Mr. Steinacher its then existing gas plant and agreed to purchase gas light from the latter or his assigns for the term of 25 years from the date service under the contract was begun; and Mr. Steinacher on his part agreed to improve the plant so as to furnish a specified quality of light, etc. About three years after entering into the performance of this contract, Steinacher assigned his interest therein to defendant in error, which continued the performance of the contract until practically the end of the contract period.

The notarial instrument, in which this simple contract may be said to be buried, contains, as is customary in all Spanish documents, a recital of all negotiations leading up to the final agreement—in fact its entire history from its incipiency; and the translation of it—and a very imperfect and ungrammatical one—fills the printed record from page 12 to page 39; but the only portion material to the questions raised on this writ of error refers to the question of the kind of money in which payments were to be made.

The contract expired by limitation of time on September 15, 1900. This suit was begun in October, 1901, to recover the sum of $14,600.60, claimed to be due defendant in error for furnishing lights under said contract between November, 1899, and said September 15, 1900, payment in gold being demanded at the same price mentioned in the contract, less some payments on account. (See bill of particulars, Record, pp. 2 and 3.)

The declaration consisted of the common counts and a count upon an account stated. A demurrer to this latter was sustained, which by mistake does not appear of record; but as defendant's pleas go only to the common counts, and issue was joined and trial had thereon without objection, plaintiff would in any event be considered to have abandoned or waived its special count. So we arrive at the same result as though the record was correct, to wit, that the common counts and the pleas thereto formed the issue upon which the case was tried and the judgment entered.

The defendant (plaintiff in error) filed four pleas: *non assumpsit*, *nil debet*, payment to a third party by assignment from plaintiff as to the sum of $5,196.88, and set-off to an amount equal to the claim for penalties assessed against the plaintiff for non-burning of lights (Record, pp. 3 and 5, bottom), and issue was joined thereon.

Upon these issues trial was had on November 5 and 6, 1902, which resulted in a verdict for plaintiff for $8,761.35.

From the judgment upon that verdict defendant below sued out this writ of error.

The evidence on behalf of plaintiff consisted of the contract, the testimony of L. A. Scott, manager of plaintiff company, as to the course of dealing between the company and the city, and of one Andres Crosas as to the kinds of money in circulation in Porto Rico in the year 1875. The evidence for defendant consisted of the testimony of the mayor and other city employés as to the course of dealing between the parties and as to a settlement made on June 22, 1900, of all claims up to that time, of which also written evidence was offered.

The errors assigned for the consideration of this court cover fifteen points, as follows (Record, pp. 59–62):

I.

The court erred in allowing one Andres Crosas, a witness for the plaintiff, in answer to the question, "But in the year 1875 what kind of foreign money was current in Porto Rico?" to testify as to the different kinds of money in circulation at the time indicated and the value thereof, against the objection and exception of the defendant.

II.

The court erred in sustaining the objection of plaintiff to the following question asked of said witness, Andres Crosas, by defendant on the cross-examination of said witness, to wit: "How long did these mediums continue to be circulating mediums?" and in refusing to allow said witness to answer said question.

III.

The court erred in sustaining the objection of plaintiff to the following questions asked of said witness, Andres Crosas, by defendant on the cross-examination of said witness, to wit, "What was the money current in this island in the year 1890?" and "What money was current in this island

between the years 1890 and 1899?" and in refusing to allow said witness to answer said questions.

IV.

The court erred in sustaining the objection of plaintiff to the introduction in evidence of and excluding from the consideration of the jury the bill of particulars produced and filed in said cause by the defendant upon the motion of the plaintiff and offered in evidence by the defendant at the trial of said cause.

V.

The court erred in charging the jury, against the objection and exception of the defendant, in the following language, to wit:

"It is stated in the contract in one place that payment was to be made to the contractor in circulating foreign money in commerce; in another place it is stated that if kerosene lamps were to be furnished, as they were in certain events, that the pay for that would be $3.00 in current money monthly for each lamp. The gas works were sold, as the contract shows, for a certain sum of money—thirty thousand dollars—payable in foreign commercial money. I find in that proposal and in the contract that lighting shall be had for $3.00 monthly for each lamp. I find it stated that payments were to be made in circulating foreign money in commerce."

VI.

The court erred in charging the jury, against the objection and exception of the defendant, in the following language, to wit:

"I tell you as a matter of law that under that contract the payment for lighting was to be made in the money that was then current and in circulation in the island of Porto Rico; that was what was meant by 'current foreign money' when the term was used in that contract; that was what was meant by the term 'current money' in that contract, or even by the term 'currency' in that contract."

VII.

The court erred in charging the jury, against the objection and exception of the defendant, in the following language, to wit:

"Therefore I say to you that under this contract these payments for these lights were to be made in American gold or silver, or in Spanish, Mexican, Colombian, Peruvian, Chilian and Venezuelan gold. Now the party could discharge it in any one of these mediums of exchange, and the testimony is before you as to what that money was worth."

VIII.

The court erred in charging the jury, against the objection and exception of the defendant, in the following language, to wit:

"If their minds met and the money was paid by the one and received by the other without any protest, then that would have made a change in the kind of money the contract was to be discharged in. If the City of San Juan owed the plaintiff a certain amount for lighting and the City of San Juan offered to pay so much money and at the same time said to the debtor (creditor?), 'I dispute your claim; that is all that I will pay for it, and you must accept this in satisfaction or have nothing,' and then the debtor (creditor?) accepted it, it would be a settlement; but if the City of San Juan merely paid a certain amount to the debtor (creditor) and the debtor (creditor) protested at the time that it was not as much as he was entitled to, that would reserve his rights in the matter, and he would be entitled to receive and credit that amount on the claim and then sue for the balance of it afterwards."

IX.

The court erred in charging the jury, against the objection and exception of the defendant, in the following language, to wit:

"So far as any claim on the part of the defendant for fines and delinquencies in complying with this contract, there is

no testimony in reference to them, and you can find nothing on that account."

X.

The court erred in refusing to instruct the jury, as requested by the defendant, in the language or to the effect following, to wit:

"If you find from the evidence that the defendant was bound to pay the plaintiff for its services in 'current money,' which phrase is the equivalent of 'money in current circulation'—and I charge you that the contract so provides, and does not provide for payment in any kind of foreign money—and you further find that through a series of years payment was made under the contract by defendant and accepted by plaintiff in money of a certain kind and value, then such payment and acceptance is cogent evidence of what was meant by the phrase 'current money' as used in the contract between the parties."

XI.

The court erred in refusing to instruct the jury, as requested by the defendant, in the language or to the effect following, to wit:

"But although a written contract exists between the parties, these same parties may by subsequent verbal agreement or by a well-defined subsequent course of action under the contract change the terms of that contract; and if you believe from the evidence that the plaintiff through a series of years received and accepted from the defendant payment for its services in money of a certain kind and to a certain amount as such payments became due from time to time, then you are warranted in finding that the parties by such course of action had changed the provisions for payment originally made, even though such provisions had called for money of a different kind or to a different amount."

XII.

The court erred in refusing to instruct the jury, as requested by the defendant, in the language or to the effect following, to wit:

"If you find that the plaintiff through a series of years continued to receive payment from the defendant for its services in Porto Rican currency to the amount called for by the contract, knowing that the defendant made such payments as and for a full discharge of its obligations under said contract, then the plaintiff by the acceptance of such payments with that understanding is estopped to claim that payments should have been made in any other medium or to any larger amount."

XIII.

The court erred in refusing to instruct the jury, as requested by the defendant, in the language or to the effect following, to wit:

"If you believe from the evidence that at the time of the assignment admitted to have been made to the firm of Müllenhoff & Körber the amount then due from the defendant to the plaintiff was compromised and fixed, then the plaintiff is bound by that compromise; and, the amount then agreed upon having been subsequently paid, the plaintiff can make no claim for any services rendered before the end of the period covered by that compromise."

XIV.

The court erred in refusing to instruct the jury, as requested by the defendant, in the language or to the effect following, to wit:

"As a matter of law the meaning of the phrase 'current money' as used in the written contract introduced in evidence is that money which was in ordinary circulation in this community at the time any payment became due under the contract, and is not confined to the money which was current at the time the contract was made."

XV.

The court erred in refusing to instruct the jury, as requested by the defendant, in the language or to the effect following, to wit:

"If you find from the evidence that on the 20th day of January, 1899, the obligation from the defendant to the

plaintiff, either by the written terms of the contract or by the practical construction put upon it by the parties subsequently to its making, was dischargeable in the currency of Porto Rico, then I charge you as matter of law that the plaintiff is entitled to recover only sixty cents in American gold for each dollar of Porto Rican currency which it would have been entitled to receive if no change of money had been made."

I.

The assignments numbered I, II, III, and XIV may be considered together, as they all refer to the kind of money by which the compensation named in the contract was to be measured and the amount fixed.

Andres Crosas was introduced as a witness for the plaintiff to prove what money had been in circulation in Porto Rico and its value (Record, pp. 42–44). On direct examination he was asked, "In the year 1875 what kind of foreign money was in circulation in Porto Rico?" to which the objection was that the question was immaterial, in that no claim was being made for payments due in 1875 or any other year until 1899, and that current money in 1875 may have been entirely different from current money in 1899 and 1900 (Record, p. 42). The same idea was carried out in cross-examination by the two questions whose exclusion is the subject of the second and third assignments, and by the charge requested, the refusal of which is the subject of the fourteenth assignment.

The question of payment is referred to in those parts of the contract and proposals leading up to it found on the pages and lines of the printed record following, to wit: Page 16, last line; page 17, last line; page 20, line 4; page 24, line 29; page 25, 38th and 41st paragraphs or conditions; page 26, 7th line from bottom; page 29, line 30; page 30, line 25; page 36, line 6, and page 37, 6th line from bottom. From these extracts it appears that the price of the lamps was three dollars in "currency" or "current

money." It is not denied that these two terms are synonymous, being different translations of the Spanish phrase "moneda corriente;" but we do not agree that the phrase "circulating foreign money in commerce" has a like meaning. We contend that when that phrase was used in the 8th paragraph of the "administrative conditions" of the proposal (Record, p. 20, top), it showed a difference in value between that money and "official currency," and that said paragraph meant only that the *medium* of payment to be used was the foreign money, probably because it was more convenient at that time and *not* that the *value* of the service was thereby *fixed* in *terms* of foreign money. This is made clear by the provision of the same paragraph that this foreign money was to be "received without any premium that will equalize it," etc. This is the only place in which *foreign* money, or the money of commerce, is mentioned in connection with the payments. In all other places, including those *fixing the price*, currency or current money is spoken of.

It will be noticed that plaintiff introduced *no* evidence touching upon the question of payments actually made under the contract at *any time*, but left it to the defendant to bring out upon the cross-examination of the witness Scott (Record, p. 40) that during more than ten years, during which he had managed the company's affairs, payments were always made in terms of Mexican or Porto Rican "pesos." We submit that the most favorable contention possible for plaintiff was that the terms of the contract regarding payment were ambiguous, in which case the *actual construction* put upon those terms by the parties would be controlling; hence, as no claim was being made as to non-payment for any service during the first twenty years of the contract, the question of the circulating medium at the time of its making must have been immaterial and the only material matter during that time was in what money payments were actually made and the

mediums in circulation at different periods in which such payments might have been made; but, having allowed that question, we certainly had a right to follow it up in cross-examination by asking how long that foreign money continued to circulate and how many changes in circulating mediums had taken place since. Scott had already testified that he had accepted the Mexican and Porto Rican "pesos" because he could not get anything else, and we should have been permitted to show the existence of other mediums during the same period as bearing upon the question of such acceptance being forced or voluntary. Further than that, the only ground of objection was (Record, p. 43) that "the contract could refer to nothing else than foreign money which was current here at the time the contract was made," which we have shown, we think, to be an erroneous assumption. Hence, as against that objection, the witness should have been permitted to answer.

Such evidence, moreover, was admissible upon the ground set out in the charge requested and refused, as stated in the XIV assignment.

If a contract is made payable in terms of currency or current money, oral evidence is always admissible as to the meaning of those terms as between the parties (Thorington *vs.* Smith, 8 Wall., 1).

In the absence of such evidence, where the performance of the contract extends through many years, the actual construction put upon the contract by the parties, and the medium in which partial payments have been made, is conclusive as to their intention.

Chicago *vs.* Sheldon, 9 Wall., 50.
Cook *vs.* Lillo, 103 U. S., 792.
Dist. of Columbia *vs.* Gallaher, 124 U. S., 505, 510.
The Confederate Note case, 19 Wall., 548.
Bissell *vs.* Heyward, 96 U. S., 580.

The head-note to the last cited case says:

"A decree or judgment, when rendered upon a contract payable in Confederate Treasury notes, should be for a sum equal to the value of those notes, not in the gold coin, but in the legal-tender currency of the United States, at the time when and place where they were *payable*."

See also—

Deering *vs.* Parker (Colonial appeal from Mass., A. D. 1760), L. C. P. Co. ed. U. S. Sup. Ct. Rep., bk. 1, p. 925.

If the provisions of the contract were to any extent ambiguous, we should have been allowed on cross-examination to go at large into the question of circulating mediums at different times during the performance of the contract as affecting that question, as well as the testimony previously given by plaintiff's manager, Scott.

II.

We do not care to urge the fourth assignment of error, as it was assigned under a mistaken impression that one of defendant's witnesses had been examined as to its correctness before it was offered.

The fifth, sixth, seventh, and tenth assignments may be considered together. The first three named are exceptions to charges given by the court explaining in what kind of money payments under the contract were to be made. We have already referred to the pages of the record on which those parts of the contract referring to payments are printed, and have shown that no reference to "foreign money in commerce" is made in connection with payments *for lights*, except at the top of page 20, which refers to the *medium* of payment and not to the *amount*. We therefore contend that the charge excepted to by the fifth assignment misstated the

facts proven in the case, while those charges excepted to by the sixth and seventh assignments misstated the law applicable to the facts proven, and in both ways the jury were misled.

The testimony of the witness Crosas showed that even in 1875 there was a distinction between Spanish "currency" which was circulating here and the foreign gold. Judge Hord, counsel for plaintiff below, admitted as much when he said, in reply to a question of the court (Record, p. 43): "It (the contract) specifies no foreign country, but it makes a distinction between the money of that foreign country, whatever it was, and *Spanish money*." Farther down upon the same page witness Crosas is recorded as saying, "Nearly all the Spanish silver had been taken away from here." And again, further down, "It was agreed between the Treasurer and the merchants at large here in the island to receive dues in American silver, giving .526 per cent. premium on the Spanish silver, although you could not get the Spanish silver." So if we are correct in our contention that the payments were to be made in "current money" and not in "foreign money," this testimony of their own witness shows that there was a decided difference in value between the two, and the charge of the judge could not be correct.

Further, the charge contained in the seventh assignment states that payments might be made in any one of these foreign moneys; but if that were true the evidence gave the jury no fixed criterion for the assessment of damages, because the same witness testified that each of these foreign moneys had a value different from the others (Record, p. 42, bottom), and all were superior in value to the Spanish money.

On the other hand, we claim that our charge requested and its refusal, made the subject of the tenth assignment, should have been given as correctly stating the law: First, that payments under the contract were to be made in "current money"—meaning "money in current circulation"—and, second, that payments made under the contract in a

certain kind of money and accepted by the creditor showed what had been the actual construction of the phrase "current money" and was cogent evidence thereof. The authorities cited near the close of the previous subhead of this brief support this contention also. Indeed, in one of those cases, the court go even further, using the following language:

"We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must *prevail over* the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

District of Columbia *vs.* Gallaher, 124 U. S., at 510.

See also—

Topliff *vs.* Topliff, 122 U. S., 121, 131.

III.

The eighth, eleventh, and twelfth assignments may be considered and argued together. The eighth excepts to a charge given by the court, and the eleventh and twelfth are exceptions to charges requested and refused—all treating of the question of what was necessary in order that rights of parties under the contract should be affected by subsequent agreement or conduct. The charge given by the court fixed the criterion at such evidence as would prove the making of a new contract—*i. e.*, an actual meeting of the minds—and went far toward giving the jury to understand that it must be an express agreement. The first charge asked and refused proceeded on a like basis of agreement or understanding, but claimed that such understanding could be deduced from conduct alone. The second charge refused proceeded upon the theory of estoppel by conduct, irrespective of the mental attitude of the parties, and to that extent go the authorities.

In the Am. & Eng. Encyclopædia of Law, vol. 22, page 539, the following statement is made regarding payment and its effects:

"The acceptance of payment in a different medium from that called for in the contract is effective to discharge the indebtedness. In fact, whatever of value the creditor accepts as payment, though different from what he could be required to accept, will operate as payment and discharge the indebtedness; and this is true though the payee *protests* against being required to accept such medium, and though it is of a depreciated value as regards the medium stipulated for."

A case which seems absolutely conclusive of the one at bar upon the point under discussion is that of Savage *vs.* United States, reported in 92 U. S., 382. In that case it appeared that the testator of plaintiff in error had purchased $15,000 of United States Treasury notes, and, upon notice that the Government was ready to redeem the same, claimed that he was entitled to the amount in gold, which was then at a premium. The Government refused to pay in gold. The remaining facts and the conclusions of the court are best stated in its own language:

"Throughout the testator of the plaintiff insisted that it was his right to have the notes paid in gold; and on the 3rd of March, 1866, he caused the notes to be transmitted here to certain bankers, with instructions to present the same at the Treasury and ask for the payment of the same, with interest, in gold, and with directions that, if the payment in gold were refused, to accept the currency under protest. Payment in gold was subsequently refused; and the agents accepted the principal and interest after maturity in legal-tender notes, *under protest*, as directed by their employer. * * *

"Payment of the Treasury notes was accepted by the testator of the plaintiff; and it appears that he, at the time the payment was made, then being in full life, surrendered the notes to the Secretary for cancellation. Neither deception, mistake nor undue advantage, is suggested; but the whole record shows that it was an honest difference of opinion between the Secretary and the decedent as to the rights of the

parties, and that it terminated by the voluntary acceptance of the legal-tender notes, on the part of the agents of the decedent, in lieu of gold, as offered by the Secretary, and by the surrender of the Treasury notes to him for the United States. Such an acceptance of payment was a waiver of the claim antecedently made, and amounted to a full discharge of the same, independently of the question whether the notes accepted in payment are or are not a legal tender, as insisted by the counsel for the defendants. * * *

"Gold was claimed; but the Secretary refused to pay in that medium; and the agents of the decedent, acting in pursuance of his instructions, accepted the medium offered by the Secretary, knowing full well that it was offered in full discharge of the Treasury notes; and it appears that they not only accepted the medium of payment offered by the Secretary, but surrendered the Treasury notes to the Secretary, as the well known financial agent of the United States. * * *

"Viewed in the light of these suggestions, it must be held that the protest, being unauthorized by law, was a mere *ex parte* act, without any legal efficacy to qualify the voluntary surrender of the Treasury notes, which both parties understood to be absolute and unconditional. * * * Prompt payment, no doubt, was desired; but the decedent was under no legal compulsion to accept any other medium of payment than that which he demanded. * * * They surrendered the securities, and asked leave to enter the protest in the same communication, which was, in effect, saying 'Our principal still thinks he ought to be paid in gold; but, inasmuch as the Department declines to pay in that medium, he has decided to accept payment in the medium which you propose'" (92 U. S., 384–389).

This last illustration is very similar to the one from which the court in its charge drew the opposite conclusion, and fits perfectly the attitude of the gas company, as shown in the testimony of its manager, Scott (Record, p. 40).

To the same effect in principle are the following cases:

United States *vs.* Justice, 14 Wall., 535.

Mason *vs.* United States, 17 Wall., 67.

Baird *vs.* United States, 92 U. S., 430.

Washington *vs.* Opie, 145 U. S., 214.

Chicago, etc., R. R. Co. *vs.* Clark, 178 U. S., 353.

We therefore submit that the charge given and excepted to was not a correct statement of the law, but that a party is bound by his *conduct* in accepting and acting upon the proposals and conduct of the other party, irrespective of any *express* consent or acquiescence, and that the rights of the parties are determined upon principles of estoppel rather than of the meeting of the minds in a new contract; hence, that the charges requested by defendant should have been given.

IV.

The ninth assignment of error is to a charge of the court which told the jury that there was no evidence in support of defendant's plea of set-off for fines and delinquencies.

Manuel Egozque, a witness for the city, testified that as mayor of the city he had had dealings with Mr. Scott as representative of the plaintiff company, and had charge of the settlement claimed by the city to have been made with said Scott, at which time, "during the conversation, Mr. Scott was discussing as to there being a larger quantity owing to his company, because he would not recognize the fines which, for want of proper lighting, had been imposed, and in the general liquidation fines had been put on his company in accordance with the stipulations of the contract (printed Record, p. 45, bottom). He further testified (top of p. 46) that "a general account of the amounts owing to the company, together with the fines which had to be deducted, was shown to Mr. Scott at that time," and the amount shown by this account is then given.

We submit, therefore, that defendant had a right to have this testimony in regard to fines considered by the jury as decreasing the amount due the plaintiff, in the event they found (as they must have done) that the transaction resulting in the assignment to Müllenhoff & Körber did not amount to a compromise and settlement. Under said

charge the jury were not allowed to consider this testimony in any aspect of the case.

V.

The thirteenth error assigned is to the refusal of the judge to charge that if they should find that at the time of the assignment by plaintiff company to Müllenhoff & Körber of the sum of $5,196.88, the amount then due from plaintiff to defendant, "was compromised and fixed," then plaintiff was bound by that compromise and could recover no more for services up to that time.

This charge the court refused to give in the terms requested, but did charge as follows:

"If you believe from the testimony that that much was transferred to Müllenhoff & Körber in June, 1900, and that it was understood and agreed by the parties at that time that that was all that was owing up to that time, why then, that cuts off any claim by the St. John's Gas Company up to that period of time, and any item of this account sued on prior to that time in June would be cut off by that settlement, if there was such a settlement" (printed Record, p. 54, middle).

The court failed as usual to keep the distinction between a settlement for the *full amount claimed* by the creditor and a *compromise*. It was not necessary that the St. John's Gas Company should agree that the amount of the settlement was the full amount owing. It was enough if they agreed to take the amount offered as a *full satisfaction* of the debt, whatever it was as there was a dispute as to how much was in fact owing.

As said by Mr. Chief Justice Waite in Baird *vs.* United States:

"It is, no doubt, true that the payment by a debtor of a part of his liquidated debt is not a satisfaction of the whole,

unless made and accepted upon some new consideration; but it is equally true, that, where the debt is unliquidated and the amount is uncertain, this rule does not apply. In such cases the question is, whether the payment was in fact made and *accepted in satisfaction*" (96 U. S., 430).

The decisions of this court are full of like applications of the rule. A settlement upon the terms outlined in the charge of the court would not have been a compromise at all. We therefore submit that we were deprived of the benefit of a consideration of the true principles of compromise by the judge's refusal to give the charge as requested.

VI.

The last assignment of error refers to the refusal of the judge to charge the jury that if, on the 20th day of January, 1899, the obligation of the contract could be discharged in Porto Rican currency, either by the terms of the contract or by the practical construction subsequently put upon it by the parties, then the recovery should be limited to sixty cents in American gold for every peso due in said currency.

The judge gave a charge to the jury which recognized the legal rate of exchange which had been established by a general order of the then military government of Porto Rico, having the force of law, promulgated on the date stated, but in so charging he coupled his statement with the erroneous limitations as to the necessity for a course of conduct to amount to a meeting of the minds and for the payments to have been accepted without objection or protest—in other words, the same errors previously complained of were repeated in this connection—whereby the advantage to the defendant of the charge as to rate of exchange was wholly nullified (printed Record, pp. 53, 107).

VII.

For the errors complained of; the judgment of the court below should be reversed and a new trial granted.

Respectfully submitted.

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